

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SPECIAL COUNSEL,
Petitioner,

v.

FEDERAL EMERGENCY MANAGEMENT
AGENCY,
Agency.

DOCKET NUMBER
HQ12089010012

DATE: APR 11 1990

Ruth Robinson, Esquire, Washington, D.C., for the
Special Counsel.

Thomas Ainora, Esquire, Washington, D.C., for the
agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

ORDER

On February 13, 1990, the Special Counsel, pursuant to 5 U.S.C. § 1214(b)(1)(A)(i) (West Supp. 1989), filed a request that the Board stay for 45 days the agency's 10-day suspension of one of its employees, Mr. Leo Bosner. The Special Counsel argued in the request that there were reasonable grounds to believe that the suspension was ordered in reprisal for Mr. Bosner's engaging in protected activity, and therefore was violative of 5 U.S.C. § 2302(b)(8) and/or (b)(9). The stay was granted by Vice Chairman Maria L. Johnson on February 16, 1990.

On March 23, 1990, the Special Counsel requested an extension of the stay, pursuant to 5 U.S.C. § 1214(b)(1)(B) (West Supp. 1989), for up to 90 days. Section 1214(b)(1)(C) (West Supp. 1989) provides that the Board shall allow comment from the agency that is the subject of the stay before granting such an extension. The agency's comments were filed on April 6, 1990. For the reasons set out below, a 45-day extension of the stay is hereby GRANTED.

In her request for an extension of the stay, the Special Counsel states that the investigation for which the original stay was granted has not been completed. She states that "there remain two or three witnesses to be interviewed, and the completion of the Report of Investigation." She anticipates that this will take 60 to 90 days.

Under 5 U.S.C. § 1214(b)(1)(B) (West Supp. 1989), a statute newly enacted as part of the Whistleblower Protection Act of 1989, the Board "may" extend a stay issued by a single Member "for any period which the Board considers appropriate." This differs from its predecessor, 5 U.S.C. § 1208(c) (1988), in that the Board is no longer required to concur in the Special Counsel's determination that there are reasonable grounds to believe that a prohibited personnel practice has occurred.* Although the Board is no longer

* Because the Board is no longer required to concur in the Special Counsel's reasonable grounds determination, the case law developed under that provision is no longer directly applicable to requests for extensions of stays. See, e.g.,

required to concur in the Special Counsel's determination before granting an extension, the statute does not make the extension automatic. The use of the term "may" in the statute demonstrates that the Board must exercise its discretion in determining whether the stay should be extended.

In exercising its discretion, the Board will view the record in the light most favorable to the Special Counsel and will grant the request if the Special Counsel's prohibited personnel practice claim is not clearly unreasonable. This standard is consistent with the legislative history which shows that Congress intended to make it easier for the Special Counsel to obtain a stay under the new statute. See S. Rep. No. 413 at 20, 100th Cong., 2d Sess. (1988).

In this case, the agency contends that the stay should not be extended because the evidence does not show that a prohibited personnel practice has occurred. In support of this contention, the agency has introduced evidence indicating that, in addition to engaging in protected activity, Mr. Bosner has engaged in activity that might justify a suspension. In submitting this evidence, however, it has not demonstrated that the Special Counsel's claim that a prohibited personnel practice occurred is clearly unreasonable.

[footnote continued from previous page] *Special Counsel v. Department of Commerce*, 26 M.S.P.R. 118 (1985); *In re Kass*, 2 M.S.P.R. 79 (1980).

The agency also contends that the Special Counsel should have completed her investigation by now, and that in any event an extension of 90 days is too long. We disagree with the assertion that the investigation should have been completed. The Special Counsel has established by sworn affidavit that the investigator assigned to the case sustained an injury that restricted his mobility, and that, as a result, the investigation is incomplete. In addition, she has specified what needs to be done to complete the investigation. We agree, however, that the period of time requested for the extension is too long. It is the intent of Congress that stays not be extended "for prolonged periods of time." H. R. Rep. No. 274 at 23, 100th Cong., 1st Sess. (1987). Moreover, Congress has encouraged the Board to press the Special Counsel to present any corrective action case in a timely manner. *Id.* In view of this obligation, and given the Special Counsel's own description of what remains to be investigated, we believe that an extension of 45 days is appropriate in this case.

Accordingly, a 45-day extension of the stay pursuant to 5 U.S.C. § 1214(b)(1)(B) (West Supp. 1989) is hereby GRANTED. It is further ORDERED that:

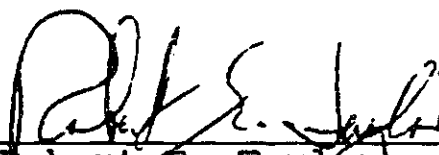
(1) The terms and conditions of the stay issued on February 16, 1990, are extended to and including May 26, 1990;

(2) Within 5 working days of this Order, the agency shall submit a verified report to the Board explaining the

facts and circumstances surrounding compliance with this Order;

(3) The Special Counsel shall file with the Board, and serve on the agency any additional information and arguments that she wishes the Board to consider for further extension of the stay on or before May 11, 1990; and

(4) Any comments on such a request for further extension that the agency wishes the Board to consider shall be filed with the Board and served on the Special Counsel on or before May 18, 1990.


Robert E. Taylor
Clerk of the Board

Washington, D.C.